

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint Against)
ROGER BERGMEIER, THE ROGER)
BERGMEIER CAMPAIGN, JIM)
PARKER, BYRONY SCHWAN, TOM)
ROY, JANET SPROULL, JERRY)
BERENS, RON ERICKSON AND JIM)
MCGRATH)

**SUMMARY OF FACTS
AND
STATEMENT OF FINDINGS**

Barbara Evans (Complainant) is an incumbent Missoula County Commissioner and a candidate for re-election. Roger Bergmeier (Bergmeier) is opposing Complainant in the election. Jim Parker (Parker) is Bergmeier's campaign manager. Bryony Schwan (Schwan), Tom Roy (Roy), Janet Sproull (Sproull), Jerry Berens (Berens), and Ron Erickson (Erickson) are all supporters of the Bergmeier campaign and signed letters of support publicizing their support and the reasons why they provided their support to Bergmeier as their choice for Missoula County Commissioner. The complaint alleges that Bergmeier and his campaign violated section 13-35-225, Montana Code Annotated (MCA), when he failed to place proper disclaimers on campaign pamphlets. The complaint also alleges that Bergmeier and his campaign violated section 13-35-234, MCA, by misrepresenting Complainant's position on public issues pertaining to campaign finance.

Complainant also alleges that Jim McGrath (McGrath) violated section 13-35-234, MCA, by publishing false statements about Complainant's position on the public issue of affordable housing. McGrath is a Missoula City Councilman who is the chair for the Subcommittee on Affordable Housing.

Claim 1

Complainant alleges that Bergmeier distributed campaign literature without any disclaimer. Disclaimers are required on campaign literature as described in section 13-35-225, MCA.

Claim 2

Complainant alleges that Bergmeier and his campaign distributed two letters signed by Schwan, Roy, Sproull, Berens, and Erickson indicating that Complainant had a "huge war chest" of contributions from "developers." Complainant maintains that this is false and is a misrepresentation of her public position on affordable housing.

Claim 3

Complainant alleges that McGrath drafted a press release misrepresenting Complainant's voting record and position on the issue of affordable housing.

SUMMARY OF FACTS

1. Complainant and Bergmeier are opponents in the 1996 election for the position of Missoula County Commissioner. Complainant is the incumbent and is seeking re-election.

2. Complainant and McGrath have served together on the Subcommittee for Affordable Housing.

Claim 1

3. A copy of a pamphlet produced by Bergmeier and the Bergmeier campaign entitled "Protect our Future . . . It's Time for Change." was procured by the Complainant and forwarded to the Commissioner of Political Practices as part of the complaint. This pamphlet does not include any disclaimer.

4. Parker, of the Bergmeier campaign, admits that the campaign disclaimer was inadvertently omitted in the initial campaign materials. This error was pointed out by Complainant on October 10, 1996; however, the staff discovered the oversight on October 6, 1996, and was in the process of remedying the problem.

5. Neither party brought the oversight to the attention of the Commissioner of Political Practices. However, Bergmeier and Parker maintain that less than 200-500 pieces were disseminated without the disclaimer. The initial batch of campaign materials was purchased on October 4, 1996. The oversight was discovered on October 6, 1996. Immediately, upon notification of the oversight, Parker ordered a stamp with the proper disclaimer and stamped all the literature with the proper disclaimer. The stamp was received on October 10, and subsequent materials were reordered and received on October 11, 1996, with the disclaimer printed on the materials.

6. Parker and the Bergmeier campaign remedied the disclaimer oversight within three days of discovery.

Claim 2

7. Bergmeier and his campaign disseminated two identical letters entitled "Dear Friends," which were signed by Schwan, Roy, Erickson, Sproull and Berens. The letter indicated that "She is making every effort to help Indiana developers turn Miller Creek into the eleventh largest city in Montana . . ." and "Barbara has a huge war chest fund, contributed largely by developers."

8. Parker indicated that the information which formed the basis of that statement was Complainant's May 20 campaign finance report. Bergmeier states that growth and development in Missoula County is the number one issue in the campaign. Bergmeier indicated that he and the Complainant differ on this issue greatly, and it is of public interest to know who is funding Complainant's campaign.

9. Complainant's May campaign finance report indicated that Complainant received more than \$20,000 in contributions for that reporting period. Approximately 200 contributions were received. Approximately 65 of those contributions may be considered "development related." Bergmeier considered any profession that could prosper from their work in land sales, development, housing construction and sales in the analysis of "developer related."

Claim 3

10. McGrath wrote a press release entitled "Subcommittee debunks affordable housing myths" and disseminated it to the press. The press release was printed on city council stationery and forwarded using the city fax machine. McGrath maintains that the press release was not a campaign piece but part of an ongoing dialogue pertaining to growth policies and the effect of those policies on affordable housing.

11. The press release contained statements pertaining to Complainant's position regarding affordable housing in the Missoula area. Excerpts include: "Barbara Evans has claimed that she is in favor of affordable housing and opposes impact fees for that reason . . . Barbara Evans has been in office throughout the emergence of the housing crisis in Missoula, yet she has been slow to respond . . . We are hard pressed to recall any action she has taken to make housing more affordable."

12. Complainant received a letter of recognition from Missoula's Chief Executive Officer, Edward Mayer, thanking her for her efforts to promote affordable housing.

13. Minutes of subcommittee meetings indicate that Complainant has supported affordable housing opportunities in Missoula.

14. McGrath sent Complainant a letter taking responsibility for the press release and apologizing for the act. The Missoulian published a news article indicating that an apology had been made.

15. McGrath stated that he had not made an attempt to check Complainant's record; rather, he relied on his own memory.

STATEMENT OF FINDINGS

Section 13-35-225, MCA, provides:

Election materials not to be anonymous. (1) Whenever a person makes an expenditure for the purpose of financing communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, or other form of general political advertising, the communication must clearly and conspicuously state the name and address of the person who made or financed the expenditure for the communication, including in the case of a political committee, the name and address of the treasurer. Communications in a partisan election financed by a candidate or a political committee organized on the candidate's behalf must state the candidate's party affiliation or include the party symbol.

(2) If a document or other article of advertising is too small for the requirements of subsection (1) to be conveniently included, the person financing the communication shall file a copy of the article with the commissioner, together with the required information, prior to its public distribution.

(3) If information required in subsection (1) is inadvertently omitted or not printed, upon discovering the omission, the person financing the communication shall file notification of the omission with the commissioner within 5 days and make every reasonable effort to bring the material into compliance with subsection (1).

Section 13-35-234, MCA, provides:

Political criminal libel--misrepresentation of voting records. (1) It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a

statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.

(2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107.

Claim 1

Based on the allegation in the complaint, and the facts disclosed during the course of the investigation, it is my conclusion that no prosecutable violation took place. Complainant alleges that Bergmeier and his campaign published campaign material which was not properly labeled with a disclaimer as required by 13-35-225, MCA.

Bergmeier did publish and distribute campaign materials without proper disclaimers. Bergmeier and his campaign freely admit this oversight. The facts indicate that Bergmeier's campaign materials were purchased on October 4, 1996. These materials did not include the proper disclaimer. The oversight was discovered on October 6, 1996. Immediately, the campaign ordered a rubber stamp bearing the proper disclaimer. This rubber stamp was designed and made available on October 10, 1996. All campaign materials were subsequently stamped with the disclaimer. The next batch of campaign materials was received on October 11, 1996, bearing the preprinted appropriate disclaimer.

Admittedly, for approximately three days, the Bergmeier campaign was out of compliance with the statute. Campaign officials estimate that approximately 200-500 pamphlets may have been distributed without the disclaimer, but further maintain that every effort was made to remedy the oversight as soon as possible. The spirit and intent of this statute are to allow candidates a reasonable period of time to bring their campaign materials into compliance with the law once an inadvertent

disclaimer mistake is discovered. The facts in this case indicate that the error was inadvertent. In addition, the facts also indicate the error was corrected expeditiously. Although the Bergmeier campaign did not notify the Commissioner of Political Practices of the disclaimer oversight, the period of noncompliance was so short, that no liability could reasonably be assessed.

Claim 2

If the requisite mental state exists, section 13-35-234, MCA can be violated by: a false statement or charge reflecting on a candidate's character; a false statement or charge reflecting on a candidate's morality; a misrepresentation of a candidate's voting record; or a misrepresentation of a candidate's position on a public issue. The first step in evaluating this claim is to determine if the statement was true or not. In this case the alleged statement was, "Barbara has a huge war chest fund, contributed largely by developers." Bergmeier has stated that he utilized the campaign finance report of Complainant which was filed with the Commissioner of Political Practices on May 20, 1996, as the underlying evidence in making that statement. After review of the campaign finance report it is clear that a reasonable person could construe a \$20,000 total of contributions in a county commissioner race to be a "huge war chest." I find that this terminology is a lawful means of expression and does not distort or misrepresent the truth. The second part of the statement, "contributed largely by developers" is a matter of opinion. I analyzed the data and discovered that more than 200 contributions were made as of the filing of the May 1996 report. Approximately 65 of those contributions may be attributed to development related professions and industries. It is reasonable to conclude that this is a large amount of contributions. The statement is neither true nor false, it is simply a matter of opinion based on accumulated data which appeared in Complainant's campaign finance report. It is natural and part of the political process for candidates and their

opponents to express data, statistics, or other statements in a light most favorable to that candidate's campaign. This does not rise to the level of "misrepresentation" as contemplated in the statute. In sum, I find that no false statement or misrepresentation was made and therefore, no violation occurred.

Claim 3

Utilizing the analysis outlined above, it is necessary to determine whether or not a misrepresentation or false statement regarding a candidate's voting record or position on a public issue was made. The press release which was initiated by McGrath stated "Barbara Evans has been in office throughout the emergence of the housing crisis in Missoula, yet she has been slow to respond . . . We are hard pressed to recall any action she has taken to make housing more affordable." Complainant has submitted material indicating that she has supported affordable housing during her tenure as Missoula County Commissioner. It appears that her voting record on this issue has been supportive of affordable housing. McGrath contends that Complainant's voting record was not distorted, in fact Complainant's voting record was not mentioned in the press release. Given the facts, it is clear that Complainant's position on affordable housing, a public issue, was misrepresented by McGrath in the press release.

The second step in determining whether or not a violation occurred is to determine whether the misrepresentation of a candidate's position was made "knowingly" or with reckless disregard as to whether or not it was true. Montana law defines terms denoting states of mind at section 1-1-204, MCA. "Knowingly" denotes only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of the act or omission. In comparison, "negligence" denotes a want of attention to the nature and probable

consequences of the act or omission that a prudent man would ordinarily give in acting in his own concerns. The facts in this case indicate that the statement made by McGrath was not made knowingly. McGrath stated that he did not check voting records or discuss the details of Complainant's position with her. Rather, he relied on his memory to make the judgment which prompted the news release. McGrath stated that the news release was not intended as a campaign piece, but the purpose was to engage in a continuing dialogue about growth policies and how they affect affordable housing in Missoula. McGrath stated that, in his opinion, there is a difference between voting in support of affordable housing issues and actively working to eliminate the problem. McGrath feels it is his duty to point out policy differences and the effects of growth policies to the public. He states that the press release was a method to express his opinion about the policies and the problem.

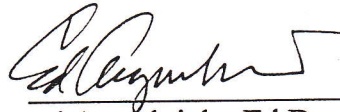
It seems obvious that issuing a press release during the height of a campaign without checking specific facts is not fair or prudent. In fact, it is my opinion that McGrath acted negligently in doing so. However, negligence does not rise to the level of criminal political libel. While it is regrettable that the entire incident occurred, McGrath has attempted to rectify the incident by making a public apology to Complainant. Indeed the apology was reported in The Missoulian, a newspaper which enjoys a large readership. Given the above facts, I find that no violation occurred.

CONCLUSION

Based on the preceding facts and findings, there is insufficient evidence to conclude that Roger Bergmeier, Roger Bergmeier's campaign, including Parker, Schwan, Roy, Sproull, Berens, or Erickson violated either sections 13-35-225 or 13-35-234, MCA.

Based on the preceding facts and findings, there is insufficient evidence to conclude that Jim McGrath violated section 13-35-234, MCA.

DATED this 1st day of November, 1996.

A handwritten signature in dark ink, appearing to read 'Ed Argenbright', written over a horizontal line.

Ed Argenbright, Ed.D.
Commissioner